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U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA — WESTERN DIVISION

UNITED STATES OF AMERICA, EX REL. NYOKA LEE and TALALA MSHUJA,

Plaintiff,

vs.

CORINTHIAN COLLEGES INC., et al.

Defendants.

CASE NO. CV 07-01984 PSG (MANx)

DEFENDANTS CORINTHIAN COLLEGES INC., DAVID MOORE, AND JACK D. MASSIMINO'S NOTICE OF MOTION AND MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6) AND 9(B)

(DECLARATION OF STACY HANDLEY, REQUEST FOR JUDICIAL NOTICE, AND PROPOSED ORDER FILED CONCURRENTLY)

Date: April 2, 2012
Time: 1:30 p.m.
Place: Courtroom 880
Judge: Hon. Philip S. Gutierrez

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NOTICE OF MOTION AND MOTION

TO RELATORS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 2, 2012 at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom No. 880, United States Courthouse, 255 East Temple Street, Los Angeles, California 90012, before the Honorable Philip S. Gutierrez, Defendants Corinthian Colleges, Inc. (the "School") and David Moore and Jack D. Massimino (the "Individual Defendants") will, and hereby do, move the Court for an order dismissing all causes of action of the Relators' First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, and pursuant to Federal Rule of Civil Procedure 9(b) for failure to allege fraud with sufficient particularity.

This Motion is made on the grounds that Relators have failed to allege with particularity sufficient facts to establish the essential elements of a cause of action under the False Claims Act ("FCA"). First, Relators have not pled any false statement, report, or claim made or caused to be made by the School or the Individual Defendants. Relators allege that the School falsely certified its compliance with a prohibition in the Higher Education Act against paying incentive compensation to admissions representatives. However, the FAC does not and cannot identify any conduct by the School or the Individual Defendants that violated the statutory requirements or the Department of Education regulations in place during the operative time period. Nor does the FAC adequately allege that the School or Individual Defendants knowingly misrepresented that they were compliant with statutory requirements. Because the FAC fails to allege the requisite falsity and scienter, it fails to state a claim under the FCA.

Second, the FAC should be dismissed because it lacks the specificity required by Federal Rule of Civil Procedure 9(b). The FAC relies on generalized allegations about Defendants' purported practices, with no factual detail about who

was involved, or where, when, and how the alleged fraud was accomplished. Accordingly, the FAC is insufficiently particular and must be dismissed.

Third, the FAC should be dismissed to the extent it relies on conduct predating 2005 because such claims are barred by the statute of limitations. The FCA provides for a six-year statute of limitations, and the FAC contains no allegations invoking the FCA's tolling provision that would permit Relators to reach farther back. Accordingly, the FAC fails to state a claim for pre-2005 conduct.

Finally, Relators' claims against the Individual Defendants must be dismissed because the FAC lacks sufficient detail about the purported role those defendants played in the alleged fraud, and accordingly fails to allege the most basic elements of an FCA claim, as well as to meet the heightened requirements of Federal Rule of Civil Procedure 9(b).

This Motion is based upon this Notice of Motion; the attached Memorandum of Points and Authorities; the concurrently filed declarations and Request for Judicial Notice; all pleadings and records on file in this case; and any argument at a hearing of this matter.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on January 13, 2012.

I. INTRODUCTION

The First Amended Complaint ("FAC") is Relators' second attempt to state a claim under the False Claims Act based on the theory that Corinthian Colleges, Inc. ("the School") falsely certified its compliance with a law prohibiting the payment of "any commission, bonus or other incentive payment" to admissions representatives based on their "success in securing enrollments." 20 U.S.C. §1094(a)(20). This Court dismissed the original complaint with prejudice, and while the Ninth Circuit agreed that Relators failed to state a claim, it gave Relators a second chance to plead their case. The FAC not only fails to cure the defects in the original complaint, but highlights why this lawsuit should be dismissed. As the FAC makes clear, Relators hope to embark on a fishing expedition that spans more than a decade and covers every one of the 100 campuses operated by the School, even though Relators can neither explain how the School allegedly violated the law, nor provide any details about the alleged fraud. Rules 8 and 9(b) preclude this result and mandate dismissal.[1] Moreover, Relators' opportunistic attempt to expand the scope of this case from the two-year period covered in the initial complaint (2005-2007) to the decade between 2000 and the present is barred by the False Claims Act's statute of limitations.

The first, and most fundamental, flaw in the FAC is that it does not identify any conduct by the School inconsistent with the incentive compensation ban, and therefore does not allege two of the required elements of a cause of action under the False Claims Act: a false statement, made with scienter. Central to the FAC is the claim that the School operated outside of a regulatory "Safe Harbor" that permitted schools to adjust salaries for admissions personnel up to twice a year, so long as those adjustments were not based "solely" on the number of students enrolled.

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[1] "Rules" refers to the Federal Rules of Civil Procedure, unless noted otherwise.

(FAC ¶¶ 24, 33-37.) However, the FAC fails to explain how the School purportedly failed to comply with the Safe Harbor. As the FAC acknowledges, the School had a written program that defined the eligibility requirements for a salary increase. (*Id.* ¶ 14.) Under that program, to get a raise, an admissions representative had to enroll a specified number of students, and also (1) obtain at least a "Good" performance rating based on fifteen distinct factors; and (2) satisfy eighteen different "Minimum Standards of Performance." The FAC addresses only the performance rating, claiming that "in practice," a "Good" or "Excellent" rating depended "solely" on the number of "leads" the employee "converted" to enrollments (*id.* ¶¶ 13-15). This claim is unsupported, but even if accepted as true it does not help Relators, because the FAC alleges no facts whatsoever about the Minimum Standards of Performance. It therefore fails to raise a plausible inference that those standards did not supply an additional basis, besides just enrollments, for adjusting compensation. Because Relators "do not allege any facts regarding the meaning or basis" of a compensation requirement that on its face does not relate to enrollments, "the Complaint falls short of stating a *plausible* claim for relief." *U.S. ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 994 (9th Cir. 2011).

The FAC also fails to allege any conduct inconsistent with the law and regulations in place when the Safe Harbor was not in effect. The FAC alleges an "ongoing fraud . . . from 2000 continually through the present" (FAC ¶ 11), but the Safe Harbor to which its allegations are directed was effective between November 1, 2002 and July 1, 2011. The FAC does not purport to allege a violation of the incentive compensation ban separate and apart from the Safe Harbor, nor could it. Even before the Safe Harbor's enactment, the legislative history, statutory text, and written guidance from the Department of Education ("DOE") made clear that the ban on paying a "commission, bonus, or incentive" did not preclude *salary-based* pay that accounted in some part for performance. And the regulation that replaced the Safe Harbor on July 1, 2011 considers only "multiple" pay adjustments in a

calendar year to be prohibited incentive compensation if based on enrollments. 34 C.F.R. § 668.14(b)(22)(i)(B) (2011). The FAC alleges no conduct by the School inconsistent with these provisions. Having failed to allege a violation of the statute, Relators fail to plead a false statement or scienter.

Second, the FAC should be dismissed because it lacks the specificity required by Rule 9(b). Though Relators purport to allege violations at every School campus over the last decade, the FAC includes no facts about who was involved, and what the School's practices were, at each location over that time. The FAC's "global indictment of [the School's] business is not enough" to satisfy Rule 9(b). *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 1000 (9th Cir. 2010).

Third, all claims under the FAC based on conduct predating 2005 are barred by the statute of limitations. The False Claims Act requires a relator to file a lawsuit within (1) six years after the alleged violation, or (2) three years after he knows or should know the material facts, whichever is later. *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996). Relators allege no facts that would entitle them to toll the statute of limitations under the three-year rule. And the relation-back doctrine does not assist Relators either, because the original complaint focused on conduct "in 2005 and subsequently," and made no claim based on the time period between 2000 and 2005 that the FAC now, belatedly, attempts to place at issue. (Compl. ¶ 25.) Because the FAC was not filed until December 15, 2011, all claims based on conduct prior to 2005 are time-barred.

Finally, the FAC's claims against the Individual Defendants must be dismissed, because the FAC includes no facts to support those claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Dismissal of the Initial Complaint

Relators' initial complaint alleged that, "[f]or a period of years, but particularly in 2005 and subsequently," the School violated the Higher Education Act's ("HEA's") incentive compensation ban by disciplining or firing employees

who failed to meet enrollment "quotas," and using a "matrix" to give raises based on the number of students enrolled above the "quota." (Compl. ¶¶ 25, 31.)

This Court found that the School's alleged "termination of underperforming recruiters" did "not fall under the HEA incentive payment prohibition at issue in this case," because such actions did not constitute "payments" regulated by the statute. (Dec. 4, 2009 Order at 5 (Dkt. No. 66).) The Court also found that the School's alleged compensation plans and practices fell "directly within an HEA 'safe harbor' concerning incentive payments," and therefore its statements to the government "could not have been 'false'" or made with scienter. (*Id.* at 4-6.)

The safe harbor referenced by the Court provided that the "activities and arrangements that an institution may carry out without violating" the ban on incentive compensation could include:

> [T]he payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid.

34 C.F.R. § 668.14(b)(22)(ii)(A) (2010) (the "Safe Harbor"). The original complaint alleged no facts showing that enrollments were the exclusive factor determining compensation, or that salary adjustments were made more than twice a year. On the contrary, it attached a written compensation program for the School (the "Program") showing that salary adjustments were permitted no more than once every six months and that, to receive a raise, an employee had to not only enroll a specified number of students, but also achieve at least a "Good" rating on her performance evaluation form and meet all "Minimum Standards of Performance." (Compl., Ex. A.) Accordingly, the Court dismissed the initial complaint with prejudice and entered judgment for Defendants. (Dkt. No. 66 at 7-8; Dkt. No. 68.)

B. Relators' Appeal to the Ninth Circuit

Relators appealed. The Ninth Circuit agreed with this Court that the complaint did not identify a plausible violation of the HEA and therefore failed to allege a false statement or scienter. *Lee*, 655 F.3d at 993-94, 997. However, the Ninth Circuit found that leave to amend should have been granted—despite Relators' failure to request it—because the panel could "conceive of additional facts" that might support an allegation of a false claim. *Id.* at 995.

First, the Ninth Circuit conjectured that "Relators could allege that the Corinthian employee performance rating system is merely a proxy for employee recruitment numbers." *Id.* at 995. The Ninth Circuit acknowledged that, in light of the Program's requirement that employees achieve specified performance measures, it "appears that Corinthian's promotion and salary increase system does not rely 'solely' on recruitment numbers." *Id.* at 993. However, the court "ha[d] no information as to the basis" on which an employee's performance was rated, and noted that if "recruiter performance ratings are awarded on the basis of the number of students that a recruiter enrolls, then this rating system would not in fact provide an *additional* basis on which compensation decisions are made." *Id.* at 994.

Second, the Ninth Circuit imagined that Relators might be able to state a claim if they could allege "that the [performance rating] system is based merely on those basic requirements that any employee would be required to meet," such as "showing up on time." *Id.* at 994-95. On the other hand, if performance were evaluated based on "concrete, merit-based metrics," such as metrics tied to "student retention, success at recruiting activities, records-keeping, and professionalism," the compensation system could be consistent with the Safe Harbor. *Id.* at 994 n.6.

Third, the Ninth Circuit hypothesized that Relators might state a claim if they could allege that, "despite the Compensation Program's purported or documented reliance on something other than recruitment numbers, these salary increases are *in practice* determined on the sole basis of recruitment numbers." *Id.* at 996.

In so ruling, the Ninth Circuit confirmed that under Rule 8, "only pleaded *facts* as opposed to legal conclusions, are entitled to assumption of the truth." *Id.* at 991 (emphasis added, quotation omitted). The court also emphasized that any complaint under the False Claims Act must "meet the heightened pleadings requirements of Rule 9." *Id.* at 997. In particular, with respect to the individual defendants named in the complaint, the court found that Rule 9(b) "undoubtedly" required more than the allegation that those individuals "monitored and approved of the illegal recruiter compensation practices as a means to obtain targeted enrollment levels for the respective Corinthian campuses." *Id.* at 998. Because the initial complaint provided "no additional detail as to the nature of the Individual Defendants' involvement" and failed to allege, on an individualized basis, their "participat[ion] in certifying HEA compliance to the DOE," it did not sufficiently state a claim. *Id.* However, the Ninth Circuit concluded that "Relators should have at least one opportunity to add any such facts to the Complaint." *Id.*

C. The First Amended Complaint

On December 15, 2011, Relators filed the FAC, asserting claims against the School, two individual defendants, and Ernst & Young. Effectively conceding that Relators cannot state a claim against the School based on its written Program, the FAC instead alleges that the Program was designed to cover up purportedly unlawful compensation practices. Parroting the Ninth Circuit's opinion, the FAC alleges that "[d]espite the Compensation Program's purported or documented reliance on something other than recruitment numbers, salary increases for recruiters are *in practice* determined on the sole basis of recruitment numbers." (FAC ¶ 50.) Similarly, the FAC alleges that the School's "recruiter performance rating system is merely a proxy for recruitment numbers." (*Id.* ¶ 60.)

The FAC, however, is notable for what is does *not* allege. The FAC does not claim that the School conditioned salary increases on meeting requirements that would be expected of any employee, like showing up on time. And while the FAC

recites that the School "in practice" compensated employees based "solely" on enrollments, the few *facts* it alleges do not support that claim.

The FAC alleges that "categories" of recruiters were paid based on specified enrollment "quotas," but those allegations are no different in substance than the allegations about "quotas" and "matrices" made in the initial complaint, which both this Court and the Ninth Circuit found to be deficient. (*Compare* FAC ¶¶ 13-14, 17 *to* Compl. ¶¶ 31-32.) Similarly, the FAC echoes the allegation from the initial complaint, also found to be insufficient, that the School "monitors" enrollments and that employees who "fail[] to meet their quotas are disciplined, demoted, or terminated," or suffer other adverse employment consequences like being assigned fewer "leads." (*Compare* FAC ¶¶ 15-17, 41-46, 52-55 *to* Compl. ¶¶ 31-32.)

The only new, factual allegations in the FAC regarding the School's compensation practices are found in paragraphs 14, 15, and 60, and relate to the "Good" and "Excellent' performance ratings that were used to determine eligibility for a salary increase. Specifically, in describing how the School "in practice" implemented its written Program, paragraphs 14 and 15 of the FAC allege:

> 14. . . . [The School's] compensation program indicates that it grades recruiters as "Good" and "Excellent" based on factors other than enrollment numbers. [The School] intentionally and knowingly designed its Compensation Program to show "Good" versus "Excellent" factors and ratings for the purpose of concealing [the School's] violations of the Incentive Compensation Ban and Regulatory Safe Harbor. The "Good" versus "Excellent" quality ratings are a smoke screen used to disguise the fact that its recruiters are compensated solely based on recruitment, admission, and enrollment numbers. [The School] acted with fraudulent intent and did not, in good faith, rely on the Safe Harbor Provisions.

> 15. Each student inquiry . . . is labeled as a "Lead". . . . [The School] keeps a running total of every recruiter's "lead-to-conversion ratio" ("L-C Ratio"). The L-C Ratio is a calculation performed daily by [the School's] marketing department showing the number and percentage of Leads that have enrolled by every recruiter at [the School]. . . . The L-C Ratio is the calculation used to determine the recruiters' "Good" versus "Excellent" rating, and is calculated based solely on the numbers of students who enroll at [the School].

Similarly, paragraph 60 of the FAC alleges:

> The "Good" or "Excellent" ratings for recruiters were based solely on the recruiters' L-C Ratio, *i.e.*, the recruiters' success in securing enrollments, calculated as the number of Leads that were converted to enrollments. [The School's] rating system for recruiters was nothing more than a calculation of the recruiters' enrollment percentage. [The School's] recruiter performance rating system is merely a proxy for employee recruitment numbers.

These allegations are belied by the School's documented performance ratings system, which measures performance based on fifteen separate factors that are unrelated to enrollments. (Declaration of Stacy Handley, Ex. A ("Handley Decl.").) Moreover, the FAC nowhere addresses the Program's additional requirement that the employee satisfy all "Minimum Standards of Performance" (the "Minimum Standards") in order to be eligible for a salary increase. Probably because the Minimum Standards demonstrate the School's compliance, Relators never mention them, much less allege they had anything to do with enrollment numbers.

The FAC also fails to allege facts relevant to all of the time periods it purports to put at issue. The FAC covers the time period "from July 1, 2000 to the present" (FAC ¶ 38; *see also id.* ¶ 11), but its specific factual allegations relate to the Safe Harbor, which was not in effect prior to 2002, and was superseded by new

regulations on July 1, 2011. (*See, e.g.*, *id.* ¶ 88 (alleging that "[f]rom 2000 to 2010" the School "was not compliant with Title IV of the HEA and its associated Safe Harbor regulations"); *id.* ¶ 14 (alleging that "Good" and "Excellent" ratings were designed to "conceal[]… violations of the Incentive Compensation Ban and Regulatory Safe Harbor"); *id.* ¶ 58 (alleging that the School's "recruiter compensation system … did not qualify for safe harbor protection"); *id.* ¶ 63 (the School "engaged in practices designed to obscure the fact that … salaries were not 'fixed' as required by the Safe Harbor Provisions"); *id.* ¶¶ 14, 47-49, 59 (alleging that the School knew it did not satisfy the Safe Harbor).) The FAC does not allege a violation of the HEA unrelated to the Safe Harbor. And in fact, the School's practices as generically alleged in the FAC were consistent with both the statute and regulatory guidance during time periods when the Safe Harbor was not in operation.

III. ARGUMENT

A. Legal Standards

The basic elements of a cause of action under the False Claims Act have not changed since the original complaint was filed, nor have the standards by which the complaint must be judged. To state a False Claims Act claim, Relators must still allege "(1) a false statement or fraudulent course of conduct; (2) made with scienter; (3) that was material, causing; (4) the government to pay out money or forfeit moneys due." *U.S. ex. rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006).[2] And they must still plead facts sufficient to satisfy not only Rule 8, but also the heightened requirements of Rule 9(b). *Lee*, 655 F.3d at 992.

The Supreme Court has prescribed a "two-pronged approach" for evaluating a complaint under Rule 8. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-

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[2] The False Claims Act has been amended since the initial complaint was filed, but it still requires a false statement made with scienter. *See* 31 U.S.C. § 3729 (2009).

50, 173 L. Ed. 2d 868 (2009). First, because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim, a court must determine whether the complaint pleads *facts* in support of the claims asserted. *Id.* at 1949. Allegations of legal conclusions "are not entitled to [an] assumption of truth." *Id.* at 1950. A plaintiff cannot survive a motion to dismiss by relying on "labels and conclusions." or "naked assertions" in the complaint. *Id.* at 1949.

Second, to the extent the complaint alleges facts, as opposed to conclusions, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950. A claim has "facial plausibility" when the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. The plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Where a complaint pleads facts that are "merely consistent with" liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*

Because the FAC alleges fraud, it must also satisfy Rule 9(b)'s requirement that "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). In other words, the FAC "must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

B. The FAC Fails to Allege a False Statement or Scienter

As with the original complaint, the FAC purports to allege that Defendants made false statements to the government about the School's compliance with the incentive compensation ban. But the FAC fails to identify a plausible violation of that prohibition, and therefore fails to allege both a false statement and scienter.

1. Adverse Employment Actions Do Not Violate the HEA

In the FAC, Relators repeat the allegation that the School "monitored" enrollments and "disciplined, demoted, or terminated" employees based on low enrollment numbers. (FAC ¶¶ 15, 17, 41, 44, 46.) The Ninth Circuit has made clear, however, that "adverse employment actions, including termination, on the basis of recruitment numbers remain permissible under the statute's terms" and "[do] not support the claim that a false statement was made." *Lee*, 655 F.3d at 992-93. Because the incentive compensation ban "prohibits only a particular type of incentive *compensation*," *id.* at 992 (emphasis added), the FAC fails to state a claim based on its allegations of adverse employment actions.

2. The FAC Fails to Allege Any Practice by the School Inconsistent with the Safe Harbor

The FAC also attempts to allege that the School "violat[ed] … the Regulatory Safe Harbor" by compensating admissions representatives based "solely" on enrollments. (FAC ¶¶ 14-15.) The only alleged facts on which this claim rests, however, do not indicate a plausible violation of the Safe Harbor.

a. *The FAC's Conclusory Statements Must Be Disregarded*

Despite its length, the FAC consists mostly of conclusory allegations, which are not entitled to an assumption of truth on this motion. *Iqbal*, 129 S. Ct. at 1950. For example, the FAC repeatedly incants that the School "in practice" paid recruiters based "solely" on the number of students enrolled, in violation of the Safe Harbor. (FAC ¶¶ 12-17, 37-43, 45, 50-51.) The addition of a single word to the original complaint that merely mirrors the language of the Safe Harbor amounts to no more than a "[t]hreadbare recital[] of [an] element[] of a cause of action" and "do[es] not suffice" to state a claim. *Iqbal*, 129 S. Ct. at 1949; *see also U.S. ex rel. Bott v. Silicon Valley Colls.*, No. C 04-320 MW, at 8-9 (N.D. Cal. Oct. 5, 2005) (attached), *aff'd*, 262 Fed. Appx. 810, 2008 WL 59364 (9th Cir. 2008) (unpublished) (dismissing with prejudice amended complaint filed by the same

relators' counsel that simply inserted the word "solely" throughout, in an attempt to allege conduct outside the Safe Harbor).

Similarly, Relators cannot satisfy Rule 8 simply by copying the language of the Ninth Circuit's opinion into their FAC. The FAC's allegations that the School's practice was inconsistent with its written Program, or that its performance ratings were a "proxy" for enrollments (FAC ¶¶ 50-51, 60, 63), are "naked assertions" drawn directly from the Ninth Circuit opinion, and are not entitled to an assumption of truth. *Iqbal*, 192 S. Ct. at 1949; *Hamrick v. Lewis*, 515 F. Supp. 983, 986 (N.D. Ill. 1981), *overruled on other grounds as recognized by Dumas v. Chi. Housing Auth.*, 930 F. Supp. 1238 (N.D. Ill. 1996) (plaintiff "must do more than merely … copy conclusory language from assorted decisions of other courts in which [similar] claims have been upheld"); *Gatdula v. CRST Van Expedited, Inc.*, No. CV 11-072585 VAP (OPx), 2011 WL 3652491, at *7 (C.D. Cal. June 3, 2011) (allegation that defendant maintained an unlawful "use it or lose it" policy for vacation pay failed to satisfy Rule 8, because "[a]side from parroting language from the statute and relevant case law," the plaintiffs "fail to allege what the policy was or how it deprived them of their vacation pay"); *Curry v. Ellis County*, No. 3:08-CV-1675-L, 2009 WL 2365453, at *4 (N.D. Tex. Jul 31, 2009) (dismissing complaint where plaintiff "has done no more than parrot the buzz words and language from the standard the court set forth in its earlier opinion"). Relators must plead facts, not conclusions, and the only facts alleged in the FAC fail to state a plausible violation of the Safe Harbor.[3]

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[3] Buried in the FAC is a new allegation that Directors of Admission ("DOAs"), who allegedly "serve as the recruiting manager[s]," were compensated based "solely on the number of students who enroll at [their] campus." (FAC ¶¶ 45, 38.) Other than this fleeting reference, the FAC includes no factual allegations about how DOAs (as opposed to the admissions representatives they supervise) are paid. The allegations about DOAs' compensation are insufficient to state a claim. *Iqbal*, 129 S. Ct. at 1949.

b. *The FAC Fails to Raise a Plausible Inference That Salary Adjustments are Based Solely on Enrollments*

The only new facts in the FAC regarding the School's compensation practices relate to how the School assigned the "Good"/"Excellent" performance ratings necessary to achieve a salary increase. Even if those ratings depended solely on enrollment numbers (which they did not), the FAC does not state a plausible claim for relief because the School's Compensation Program requires an admissions representative to fulfill numerous additional, non-numerical requirements before being eligible for a salary adjustment.

Although the Compensation Program is not attached to the FAC, it was attached to the original complaint, and the FAC repeatedly references the Program and its written requirements. (FAC ¶¶ 39, 50, 51.) Accordingly, the Court may consider the Program's contents. *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (doctrine of incorporation by reference permits court to consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading"). As the Program makes clear, in addition to enrolling a minimum number of students, the employee must also *both* obtain a minimum "Good" rating *and* "[s]uccessfully achieve all of the Minimum Standards of Performance" to "be eligible for promotion" to the next salary level. (Compl., Ex. A at 1, 3, 5, 7, 9.)

The FAC alleges that "Good" and "Excellent" ratings depend exclusively on a "L-C ratio" calculated by the number of "leads" converted to enrollments (FAC ¶ 15), but this claim is contradicted by documents constituting the "performance rating system" referenced in the FAC (*id.* ¶ 60). The Court "need not accept as true allegations contradicting documents that are referenced in the complaint," *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008), and as the documented performance rating system reflects, "Good" and "Excellent" ratings were not based

on the "L-C ratio" at all, but rather on fifteen performance metrics unrelated to enrollment numbers. Those metrics addressed whether the employee "effectively deals with difficult situations," is "responsive to customers' . . . needs and issues," "consistently demonstrates initiative," and similar qualitative measures. (Handley Decl., Ex. A.) Because a "Good" rating "is based upon substantive requirements that are separate and distinct from recruitment numbers," the FAC does not state a plausible violation of the Safe Harbor. *Lee*, 655 F.3d at 994.

But even if the FAC's allegations about performance ratings were accepted as true, the FAC must still be dismissed. That is because achieving *all* Minimum Standards was *also* required for a salary increase, and Relators do not explain the "meaning or basis" of the Minimum Standards, or "what an employee must do to achieve" those standards. *Id.* at 994. The FAC includes no facts whatsoever regarding the Minimum Standards—let alone facts that would bring the FAC's allegations within one of the three scenarios the Ninth Circuit suggested might be sufficient to state a claim. The FAC does not allege any facts showing that the Standards were "merely a proxy" for enrollment numbers; or that they reflected no more than "those basic requirements that any employee would be required to meet"; or that "in practice" the standards were judged "on the sole basis of recruitment numbers." *Id.* at 995-96. Because the FAC fails to allege any facts indicating that the Minimum Standards did not supply an additional basis beyond enrollment numbers for adjusting compensation, the FAC "falls short of stating a *plausible* claim for relief." *Id.* at 994.

Indeed, Relators *cannot* allege that the Minimum Standards resulted in de facto compensation based solely on enrollment numbers. Although the Minimum Standards are not attached to or referenced in the FAC, the Court may consider them because they are an integral part of the written Program that Relators claim the School used to cover up its allegedly illegal practices. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (documents necessary to understand alleged

defamatory material in the complaint could be considered on motion to dismiss); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds as stated in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006) ("[I]f a plaintiff's claims are predicated upon a document, the defendant may attach the document to his Rule 12(b)(6) motion, even if the plaintiff's complaint does not explicitly refer to it.").

The Minimum Standards articulated eighteen distinct requirements for admissions representatives, only three of which related to enrollment numbers. (Handley Decl., Ex. B.) The other standards required employees to, *inter alia*:

- Take and return inquiry calls from all potential students, and provide "accurate information about the programs including entrance requirements, curricula and academic standards";
- "Accurately classify" and "account for all inquiries," and "[c]omplete all required forms" and "paperwork";
- Schedule appointments and follow up with prospective students who fail to schedule or show for an interview;
- "Comply with governmental regulations and standards of accreditation as they relate to enrolling students";
- "Utilize an approved telephone presentation and interview procedure" and adhere to the School's policy in conducting interviews;
- "Enroll students who meet eligibility requirements as published in the college's catalog"; and
- "Develop and implement plan for generating referrals" and leads that "result[s] in an acceptable number of referrals" and is sufficient to meet the Representative's "performance goals."

(*Id.*, Ex. B.) The Minimum Standards were not a "proxy" for enrollments, nor did they merely cover basic requirements expected of any employee. *Lee*, 655 F.3d at 995. The great majority of them were non-numerical, "concrete, merit-based

metrics" similar to those in *U.S. ex rel. Pilecki-Simko v. Chubb Institute,* No. 06-3562, 2010 WL 1994794 (D.N.J. May 17, 2010), which the Ninth Circuit indicated *would* fall within the Safe Harbor. *Lee,* 655 F.3d at 994 n.6.

The school in *Pilecki-Simko* employed a "point-based compensation policy that awarded cumulative points for not only enrollment starts, but also student retention, success at recruiting activities, records-keeping, and professionalism." *Id.* The Minimum Standards likewise required the employee to fulfill record-keeping requirements (*see* Handley Decl, Ex. B, Minimum Standard No. 3 ("Accurately classify all inquiries by the appropriate media source and account for all inquiries"); *id.* No. 11 ("Complete all required forms for enrollment"; "ensure that financial aid packaging is complete"); *id.* No. 14 ("Insure that all pre-start paperwork is completed"); *id.* No. 15 ("Keep all required reports current and accurate")), and demonstrate success at recruiting activities (*id.* Nos. 10-12 (requiring "a reasonable conversion rate" at all stages of the process, and a plan for generating leads and referrals)).

Moreover, far from requiring the enrollment of as many students as possible, the Minimum Standards mandated compliance with all regulations and policies related to enrolling students and discussing financial aid, and required all admissions representatives to ensure that prospective students met eligibility requirements. (*Id.* Nos. 5, 7, 9, 17.) In other words, the Minimum Standards imposed "substantive requirements that [were] separate and distinct from recruitment numbers," and went beyond "basic performance requirements that are expected of any employee." *Lee*, 655 F.3d at 994.

Because Relators do not, and cannot, allege that the Minimum Standards resulted in compensation based only on enrollments, the FAC fails to state a plausible violation of the Safe Harbor. Consequently, it does not allege a false statement by the School about its compliance with applicable laws and regulations, or that the School knew its statements of compliance were false when made.

3. The FAC Fails to Allege Any Practice by the School Inconsistent with the HEA Prior to the Safe Harbor's Enactment

For similar reasons, although it purports to cover the time period "from 2000 to the present," the FAC fails to allege a knowing violation of the HEA prior to the enactment of the Safe Harbor on November 1, 2002.

Prior to November 1, 2002, the statute, its legislative history, and written guidance from the DOE all indicated it would be permissible to adjust salaries based on merit provided other factors were taken into account. The statute prohibits schools from awarding "any *commission*, *bonus*, or other *incentive payment* based directly or indirectly on success in securing enrollments" to admissions personnel, 20 U.S.C. § 1094(a)(20) (emphasis added), but it does not forbid a school from paying admissions representatives a salary or generally giving them raises. Indeed, the HEA's legislative history reveals that the statute was not intended to prevent all merit-based compensation simply because it was based on enrollment activity. As the conference committee emphasized, "that use of the term 'indirectly' does not imply that schools cannot base employee *salaries* on merit. It does imply that such compensation cannot *solely* be a function of the number of students recruited, admitted, enrolled, or awarded financial aid." H.R. Rep. No. 102-630, at 499 (1992) (emphasis added); *see* 67 Fed. Reg. 51723 (Aug. 8, 2002) (quoting conference committee report).

In written guidance issued prior to the Safe Harbor's enactment, DOE confirmed that salary adjustments based on factors in addition to enrollment numbers would be permissible. For example, in April of 1996, DOE stated that bi-annual adjustments to salary-based pay would be permissible if based on qualitative and quantitative factors, an interpretation formally adopted with the Safe Harbor's enactment in 2002. (*See* Request for Judicial Notice.) Thus, even before the Safe Harbor was enacted, neither the statute nor the department responsible for its

enforcement suggested that salary adjustments based *in part* on enrollment numbers were prohibited. Precisely the opposite was true.[4]

Because the FAC fails to state a plausible claim that the School paid employees based solely on enrollments, it does not state a violation of the HEA prior to the Safe Harbor's enactment. For similar reasons, the FAC fails to allege scienter with respect to that time period. Because the legislative history, the statutory text, and DOE guidance indicated it would be permissible to adjust salaries based on merit provided enrollment numbers were not the exclusive reason for the adjustment, Relators cannot show a knowing violation of the statute in the absence of allegations raising a plausible inference that enrollments alone determined compensation for admissions representatives. *U.S. ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999) (defendant's "good faith interpretation" of the law "forecloses the possibility that the scienter requirement is met"); *Hendow*, 461 F.3d at 1174 ("[I]nnocent mistakes, mere negligent misrepresentations and differences in interpretations are not sufficient for [FCA] liability to attach.") (internal quotation marks omitted).

4. The FAC Fails to Allege Any Practice by the School Inconsistent with the Current Regulation

The FAC also fails to allege a current violation of the HEA. Although Relators claim that the School made false statements "from 2000 to the present," the FAC's allegations are premised entirely on the claim that the School acted outside of the Safe Harbor, which was superseded effective July 1, 2011. The FAC nowhere alleges a violation of the current regulation—which is not surprising given

[4] Relators appear to acknowledge as much. The FAC does not distinguish between time periods when the Safe Harbor was in effect, and it attempts to build a case around the claim that enrollments were the "sole" basis for salary adjustments.

that Relators have not worked for the School since 2006 and 2009, respectively, and have no apparent knowledge of the School's current practices. (FAC ¶¶ 2-3.)

The current regulation provides that "multiple adjustments to compensation in a calendar year" will be considered prohibited incentive compensation if they are "based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid." 34 C.F.R. § 668.14(b)(22)(i)(B) (2011). Relators do not allege that *any*, let alone "multiple," adjustments were made to the salaries of admissions representatives in the calendar year 2011, since the new regulation took effect. The FAC's allegation that employees were paid based on enrollments therefore does not state a violation of the current regulation. And it certainly does not plead scienter, given that only "multiple" adjustments per year based on enrollment numbers are "considered" to violate the HEA under the regulation. *Id.*

The allegations in the FAC also make no sense under the School's current program, which the Court may consider because the School's written programs are incorporated by reference into the FAC. *See supra*, Section III.B.2.b. Currently, an admissions representative's eligibility for a pay increase depends on an annual performance rating, which is based on (1) quarterly tests of the employee's knowledge of the School's program and catalog, processes and procedures, and compliance; (2) twice-monthly observations by a manager to evaluate adherence to the interview guide, active listening skills, and rapport with prospective students; and (3) online satisfaction surveys completed several times a month by prospective students (whether enrolled or not) who evaluate on a scale of 1 to 10 the ease of working with the employee, whether the employee made them feel comfortable sharing sensitive information, and whether the employee explained the process and addressed their concerns, among other things.[5] (Handley Decl., Ex. C.) *None* of

[5] A promotion to the next salary level depends on an additional tenure requirement.

these requirements relate in any way, directly or indirectly, to enrollment numbers. The FAC's allegations plainly relate to an earlier version of the written Program and make no sense in light of the current system. How (or if) Relators believe the School currently violates the incentive compensation ban is a mystery.

Because the FAC fails to allege a violation of the HEA's incentive compensation ban or any of the regulations implementing that ban, it fails to allege a false statement or that the School or Individual Defendants acted with scienter.

C. The FAC Does Not Meet the Specificity Requirements of Rule 9(b)

The FAC should be dismissed for the additional reason that it fails to satisfy Rule 9(b). Rule 9(b) operates to "deter the filing of complaints as a pretext for discovery of unknown wrongs, to protect defendants from the harm that comes from being subject to fraud charges, to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). Relators, based on their limited experience working for "periods of time" at no more than three School campuses (FAC ¶¶ 2-3),[6] accuse the School of a purported fraud spanning more than a decade and covering all of the School's 100 campuses. (*Id.* ¶¶ 4, 16.) Rule 9(b) requires more before Relators can unlock the doors to discovery on allegations of such breathtaking scope.

Under Rule 9(b), Relators must allege the "who, what, when, where, and how" of the alleged fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). The FAC must "be specific enough to give defendant[s] notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* Generalized allegations that a defendant acted contrary to its certification of compliance with a law or regulation,

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[6] Relator Mshuja was not even a School employee. He independently contracted to worked as a test proctor, and had no role in student admissions. (FAC ¶ 3.)

which fail to identify the people involved in the allegedly unlawful practice, or where and when it took place, fail to satisfy Rule 9(b). *Ebeid*, 616 F.3d at 1000. "A global indictment of [the defendant's] business is not enough." *Id.*

As discussed above, the FAC fails to specify what the School's practices were or how they were implemented relative to the distinct regulations in place before and after the Safe Harbor. Worse, the FAC includes internally inconsistent allegations about the relevant time period. The FAC purports to cover the time period from 2000 to the present. But the causes of action in the FAC reference sections of the False Claims Act that were renumbered and amended in 2009, suggesting that Relators' claims are limited to conduct prior to 2009. *See* 31 U.S.C. § 3729(a)(1) (2009). Even more confusingly, the FAC elsewhere states that "[f]rom 2000 *to 2010*" the School certified its compliance with the HEA, "when in fact" it "was not compliant with Title IV of the HEA and its associated Safe Harbor regulations." (FAC ¶ 88 (emphases added).) The FAC's vague and confusing allegations about the relevant time frame lack the precision required to give notice of the "particular misconduct" alleged to constitute fraud. *Vess*, 317 F.3d at 1106.

The FAC is also hopelessly uncertain with respect to both geography, and the individuals involved in the alleged fraud. The FAC's allegations are premised, not on the generally applicable written Program, but on the School's alleged "practices" in implementing the Program. With respect to those "practices," Relators offer nothing but generalities. The FAC makes the sweeping assertion that "[t]he practices described [in the FAC] took place at all colleges owned by [the School]," but it fails to differentiate between campuses or offer specific facts about *any* location. (FAC ¶ 4.) The FAC does not specify the practice at each campus, or who at each campus implemented the Program, evaluated employees, or made decisions about compensation. Instead, Relators rely on generalizations and the passive voice, asserting that employees "are … paid," "are awarded," and "are compensated" based on enrollments alone (FAC ¶¶ 13-15), and that "compensation

[is] not determined by the hours worked, or hire date, but [is] assessed solely based on the number of students recruited" (*id.* ¶ 63). The FAC does not identify a single person who "determined," or "assessed" how specific employees would be paid, or where, when, and how any particular assessment occurred.

Relators' broad claim that unlawful compensation practices occurred at every campus operated by the School for the last decade falls far short of the specificity required by Rule 9(b). Courts have repeatedly found such "vague allegations that improper practices took place 'everywhere [the defendant] does business throughout the statutory time period'" insufficient to allege fraud. *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005); *U.S. ex rel. Harris v. Alan Ritchey, Inc.*, No. C00-2191Z, 2006 WL 3761339, at *6 (W.D. Wash. Dec. 20, 2006) (allegation that fraudulent billing practice described in complaint was "systematic and not limited to" the plant where relator worked failed to satisfy Rule 9(b) because relator "failed to allege any details, or involved individuals, or specific information relating to fraud at other plants"); *Sweet v. TMI Mgmt. Sys.*, No. 05-1683 (RBK), 2008 WL 724275, at *3 (D.N.J. Mar. 17, 2008) (complaint that "[did] not identify any persons involved in the alleged fraud or any discrete acts that make up the purported pattern of activity" did not satisfy 9(b)); *Ebeid*, 616 F.3d at 1000 (allegation that healthcare defendants implemented an illegal patient referral system across three distinct entities lacked particularity because it failed to identify the doctors who made referrals or their financial relationship with each entity). The FAC's vague "global indictment" of the School's business "is not enough." *Id.*

D. The Statute of Limitations Bars All Claims Based on Alleged Violations Occurring Before 2005

The False Claims Act requires a relator to file a lawsuit within (1) six years after the alleged violation, or (2) three years after he knew or reasonably should

have known the material facts, whichever is later. *Northrop*, 91 F.3d at 1218.[7] Here, Relators allege violations going back to July 1, 2000 (FAC ¶¶ 38, 88), but because the FAC was not filed until December 15, 2011, Relators' claims would, absent tolling under the three-year rule, be limited to post-2005 conduct.

Despite asserting claims that are untimely on their face, Relators fail to invoke the False Claims Act's tolling provision, much less "make the requisite tolling allegations." *U.S. ex rel. Saaf v. Lehman Bros.*, 123 F.3d 1307, 1308 (9th Cir. 1997) (per curiam). Those allegations must address when Relators learned of the material facts and why they should not reasonably have discovered them earlier. *See Moore v. Navarro*, No. C 00-03213 MMC, 2004 WL 783104, at *3-4 (N.D. Cal. Mar. 31, 2004) (dismissing complaint where relator failed to address these two points). Because the FAC makes no such allegations, Relators' claims must be dismissed to the extent they rely on alleged pre-2005 violations.

Relators cannot save these claims by arguing that they relate back to the date on which the original complaint was filed, in March 2007. The relation-back doctrine applies only if the claims in the amended pleading "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The two pleadings must "share a common core of operative facts sufficient to impart fair notice of the transaction, occurrence, or conduct called into question." *Martell v. Trilogy Ltd.*, 872 F.2d 322, 327 (9th Cir. 1989). Relators' original complaint addressed conduct "in 2005 and subsequently," and made no claim based on any time period prior to 2005. (Compl. ¶ 25.) "Cases are legion which refuse to allow relation back when the new

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[7] The majority of circuits disagree with the Ninth Circuit's rule, reasoning that only the government can invoke the tolling provision under the plain statutory language. *See, e.g.*, *U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293-94, 296 (4th Cir. 2008). Should this Court apply tolling to determine that Relators' pre-2005 claims are not time-barred, the School preserves the right to challenge the Ninth Circuit's interpretation of the statute on appeal.

allegations go beyond the time-frame of the original complaint." *Quaak v. Dexia, S.A.*, 445 F. Supp. 2d 130, 138 (D. Mass. 2006) (citing examples). Here, the rationale for denying relation back is especially compelling because the purportedly false certifications of HEA compliance pertain to distinct time periods and Program Participation Agreements ("PPAs"), and thus cannot be lumped together with other certifications as part of the same "conduct, transaction, or occurrence." *Cf. Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1134-35 (9th Cir. 2006) (rejecting relation back where later pleading added a second, otherwise identical disclosure violation, because "claims under the Privacy Act are based on the acts of disclosure themselves, each of which is distinct in time and place, if not substance"). Relators' claims arising from the pre-2005 period are therefore time-barred.

E. <u>The FAC Fails to State a Claim Against the Individual Defendants</u>

The FAC also fails to state a claim against the two individual defendants. The Ninth Circuit found that the initial complaint (1) failed to allege that the individuals submitted any claim to the government, and (2) failed to plead each individuals' involvement in the alleged fraud. *Lee*, 655 F.3d at 997-98. The FAC attempts to cure only the first defect, alleging that David Moore and Jack Massimino signed "many" of the PPAs in which the School certified its compliance with the incentive compensation ban. (FAC ¶¶ 6, 7.) But with respect to each of their roles in the alleged fraud, the FAC is just as vague as the original complaint.

The FAC alleges that Moore and Massimino both served as executives and board members of the School. (*Id.* ¶¶ 6, 7.) It further alleges that Moore was "directly in charge of [the School's] recruiting operations and enrollment practices, and setting Company enrollment targets," and was "primarily responsible for the ramp up in [the School's] enrollments in the period through 2006." (*Id.* ¶ 6.) Similarly, it alleges that Massimino "had primary responsibility for setting yearly enrollment targets for [the School's] colleges" and "was responsible for implementing the recruiting compensation practices described herein." (*Id.* ¶ 7.)

These allegations do not differ in substance from the initial complaint's claim that the Individual Defendants "monitored and approved of the illegal recruiter compensation practices as a means to obtain targeted enrollment levels for the respective Corinthian campuses," which the Ninth Circuit found insufficient to allege fraud. *Lee*, 655 F.3d at 998. Just as the initial complaint "attribute[d] wholesale all of the allegations against Corinthian to the Individual Defendants," *id.*, the FAC baldly asserts that Moore and Massimino were "responsible" for and "in charge of" the School's practices, without offering any detail as to how, when, and where they executed that alleged charge. Relators have simply rephrased the conclusory allegations of the initial complaint and asserted them separately against each individual. "Rule 9(b) undoubtedly requires more." *Lee*, 655 F.3d at 998.

IV. CONCLUSION

Relators have returned to this Court seeking to vastly expand the scope of this lawsuit, armed with nothing more than conclusory statements and unfounded speculation about the School's practices. Just like the original complaint, the FAC fails to identify any violation of the Higher Education Act, any false statement about the School's compliance with that statute, or any facts showing that the School and Individual Defendants knowingly submitted false claims to the government. The Ninth Circuit gave Relators a second chance to plead their case, even though Relators never requested this Court's leave to amend. Relators' failure, once again, to state a claim for relief demonstrates they cannot do so. For these reasons, the FAC should be dismissed in its entirety, with prejudice.

Respectfully submitted,

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